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TRA DOCKET ROOM  
August 26, 2003

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with  
BellSouth Telecommunications, Inc. Pursuant to the  
Telecommunications Act of 1996*  
Docket No. 03-00119

*Implementation of the Federal Communications Commissions' Triennial  
Review Order*  
Docket No. 03-00460

Dear Chairman Tate:

Enclosed are the original and fourteen copies of an Emergency Motion filed BellSouth. Because the subject of the Motion is relevant to both the DeltaCom Arbitration scheduled to begin on Wednesday, as well as the docket to implement the Triennial Review Order, BellSouth is filing its Motion in both dockets in light of the relevance of the Motion to both pending dockets. BellSouth is submitting its Motion for consideration by all four directors.

Copies of the enclosed are being provided to counsel of record for DeltaCom.

Cordially,



Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In Re: *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with  
BellSouth Telecommunications, Inc. Pursuant to the  
Telecommunications Act of 1996*

Docket No. 03-00119

In Re: *Implementation of the Federal Communications Commissions' Triennial  
Review Order*

Docket No. 03-00460

**EMERGENCY MOTION TO DEFER ISSUES IDENTIFIED BY  
HEARING OFFICER'S NOTIFICATION OF  
FRIDAY, AUGUST 22, 2003, OR IN THE ALTERNATIVE,  
TO CONTINUE THE ARBITRATION HEARING FOR  
APPROXIMATELY 45 DAYS TO ALLOW  
TESTIMONY TO BE SUPPLEMENTED**

BellSouth Telecommunications, Inc. ("BellSouth") files this *Emergency Motion to  
Defer Issues Identified by Hearing Officer's Notification of Friday, August 22, 2003 or in  
the Alternative, to Continue the Arbitration Hearing for Approximately 45 Days to Allow  
Testimony to be Supplemented*, and respectfully shows the Tennessee Regulatory  
Authority ("Authority" or "TRA") as follows:

**I. PROCEDURAL DEVELOPMENTS IN THE DELTACOM CASE WILL  
EFFECT THE TRIENNIAL REVIEW DOCKET.**

On Friday, August 22, 2003, the Hearing Officer serving in the above-styled  
arbitration verbally notified the parties in that docket of a telephone status conference  
for the purpose of addressing the potential impact of the Triennial Review Order on  
certain issues pending in the DeltaCom Arbitration (Docket No. 03-00119) and the

prospect of deferral of these issues (identified by the Hearing Officer as 21, 25, 26, 36, 37 and 57). Specifically, the Hearing Officer sought input from the parties on deferring those issues in the DeltaCom Arbitration docket, in order to address these issues instead in Docket No. 03-00460, the docket established to address implementation of the Triennial Review Order.

On Monday, August 25, the parties were assembled for two separate teleconferences with the Hearing Officer, in which the Hearing Officer urged the parties to reach an agreement relating to the deferral of these issues. The parties were unable to reach an agreement. BellSouth indicated its concern that the trial of these issues, in the context of the arbitration, would result in duplicative proceedings and would possibly violate the Triennial Review Order by considering some of the issues in a framework flatly inconsistent with the federal requirements established by the recent Triennial Review Order. DeltaCom instead argued that, not only should trial of the issues proceed in the arbitration, but also (recognizing that the governing law defining the relevant issues has changed in some instances) that witnesses should be allowed to supplement their pre-filed written testimony *from the stand* in order to address the potential effect of the Triennial Review Order on their issues. In the absence of an agreement, the Hearing Officer declined to make a ruling on deferral of the issues and instead urged the parties to discuss the matter further, "sleep on it", and reassemble the following morning (before traveling to Tennessee) for a final teleconference to decide the matter on Tuesday morning before commencing the hearing on Wednesday.

On Tuesday, August 26, 2003, the Hearing Officer convened a third teleconference, inquired whether the parties had agreed on any joint proposal, then

announced his intention to release a Report and Recommendation by noon on that same day. The Hearing Officer stated that the Report and Recommendation would recommend that the Directors proceed with all the issues in the matrix, except for Issues 26(b) and (c).<sup>1</sup> The Hearing Officer further explained that it was his recommendation that the parties should be free to both address the meaning and impact of the Triennial Review Order on issues pending in the arbitration, not only in post-hearing briefs, but also by permitting witnesses to supplement from the stand testimony if those witnesses believed the Triennial Review Order was relevant to their issues.

The Hearing Officer further explained that it was his determination that it **was not** proper to conduct an impairment analysis as set forth in the Triennial Review Order within the context of the arbitration proceeding, but that it **was** proper to consider other provisions of the Triennial Review and to give witnesses a chance to supplement from the stand their testimony relating to those other provisions of the Triennial Review Order.

BellSouth has not yet received the Hearing Officer's written order. However, because of the timing of travel for its witnesses and to ensure maximum time for review by the Directors of these serious matters, BellSouth believes it is necessary to proceed quickly to file this *Emergency Motion*. Based on the Hearing Officer's decision as described on the Tuesday morning call, BellSouth has grave concerns about the potential for confusion, prejudice, and needless legal error resulting from this unusual course. BellSouth's several concerns are discussed below. BellSouth urges the TRA to

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<sup>1</sup> Clearly, if deferral of these issues (which BellSouth believes are clearly related to the other sub-issues on Issue 26) can be accomplished, then it seems obvious that the entire set of issues identified by the Hearing Officer could also be deferred.

either defer all of the issues addressed by the Hearing Officer as having any potential connection to the Triennial Review Order and to consider those issues instead in the Triennial Review proceedings, or to, in the alternative, grant BellSouth's emergency request for a continuance in order to provide the parties with time to supplement their testimony using the ordinary, long-standing practice before the TRA of filing pre-filed written testimony. BellSouth believes this process could be completed in 45 days, enabling the TRA to hold an arbitration hearing in October.

**II. PROCEEDING WITH THE TRIENNIAL REVIEW ISSUES, IN THE ARBITRATION DOCKET, PRESENTS BOTH PRACTICAL AND SUBSTANTIVE ISSUES.**

First, BellSouth objects to proceeding in a fashion that would permit witnesses to supplement testimony from the stand. The TRA has a long-standing practice of collecting evidence through the filing of pre-filed direct and rebuttal testimony. This process provides for orderly presentation of issues by giving the parties ample time to consider and rebut the contentions presented. In the context of this procedure, live cross-examination enables the fact-finders to evaluate credibility and consider the weight of the witnesses' testimony, as well as providing the panel the opportunity to ask additional questions. Departing from this process to permit parties to supplement testimony, live on the stand, will result in a confused and disorganized hearing. The pre-filed rebuttal testimony will become mismatched with the direct testimony as supplemented, ensuring the need for lengthy post-hearing briefs to untangle the confused testimony on various issues. This process will also result in both the inclusion of testimony rendered moot by the Triennial Review, as well as creating the certainty of redundant presentations of other testimony in the Triennial Review proceeding, which

will quickly follow. Finally, this dramatic shift in the focus of the hearing will surely require additional hearing time for the arbitration hearing – at a time when the Authority is managing the significant proceedings mandated by the Triennial Review Order.

Issue 26, addressing both unbundled (non-UNE) switching and the market rate for that switching, is particularly illustrative of the problems created by this dual-track process. The Triennial Review Order establishes detailed standards for the TRA to follow and requires that the TRA engage in an impairment analysis. Yet, the pre-filed testimony in the arbitration docket does not include this evidence or even address the FCC's standards. Consequently, by proceeding on this issue in the arbitration and permitting parties to simply throw in new evidence from the stand, the TRA would expend its limited resources conducting a proceeding – which all parties recognize to be largely moot – and then would be required to turn around and conduct another proceeding –to consider the evidence that is actually relevant and crafted to address the FCC standards under the Triennial Review Order.

Besides the practical concerns noted above, proceeding with issues better deferred to the Triennial Review Docket raises due process concerns as well. Implicit in the due process right to notice and opportunity to be heard, is the right to know, *in advance of trial*, what issues will be tried. Tennessee has long rejected trial by ambush, instead opting for an organized process of pretrial discovery. See, for example, *Hood v. Roadtec, Inc.*, 785 S.W.2d 359, 362 (Tenn. Ct. App. 1989) (noting that discovery rules were intended to do away with element of surprise and trial by ambush.) The Tennessee Sunshine Law protects those interests in the context of administrative proceedings as well, by ensuring that parties have notice before facing

administrative process. Consistent with this precedent, the TRA's practice of using pre-filed testimony and affording discovery also ensures that trial time can be spent evaluating parties' best argument and evidence – not responding to surprise antics. Drastically altering the subject of a trial less than one full business day prior to its commencement flies in the face of these important due-process concerns.

**III. THE STATUTORY MAKEUP OF THE TRA, AND THE AGENCY'S PRIOR DECISIONS RELATING TO THE TRIENNIAL REVIEW DOCKET, STRONGLY COUNSEL IN FAVOR OF DEFERRING THE ISSUES TO THE TRIENNIAL REVIEW DOCKET.**

In addition to the potential for significant confusion and delay at the hearing (threatening to result in, at best, a waste of administrative resources, and, at worst, the potential for due process harms to the parties as a result of surprise testimony), there are additional procedural concerns that relate uniquely to the Authority. Because of the Authority's statutory make-up, as a four-director agency that sits, ordinarily, in three-director panels, Tennessee faces unique issues with respect to the Triennial Review Order. Pursuant to the Authority's decision on June 16, 2003, it has been decided that all four directors will sit in their capacity as rulemakers regarding Triennial Review Issues. Proceeding in the arbitration docket on issues that may have an impact on the Triennial Review proceedings with only three directors is, consequently, problematic. Again, at best, proceeding first with a three-person panel – and then later with a four-person panel – in two separate dockets creates the obvious potential for significant waste of administrative resources at a time when the agency is unusually busy. Proceeding with two separate panels, one of which has before it testimony which may no longer be relevant to newly-established guidelines by the FCC, creates a clear potential for inconsistent decisions and places the fourth director at a significant

disadvantage with respect to participation in the Triennial Review Proceedings. The Authority has already decided that all four directors should participate in the Triennial Review proceedings. Holding a mini-pretrial of some of those same issues in the DeltaCom arbitration docket, before having the full-blown hearing in the Triennial Review Docket, is wasteful and duplicative and runs afoul of the decision to present these issues before all four directors.

**IV. DETERMINATION OF THE PROPER DOCKET IN WHICH TO CONSIDER ISSUES AND THE MANAGEMENT AND CONSERVATION OF ADMINISTRATIVE RESOURCES ARE MATTERS WITHIN THE AUTHORITY'S DISCRETION.**

The TRA has the power to use its discretion to manage its docket to best utilize its limited resources. By proceeding with issues that the Hearing Officer has identified as potentially relevant to the Triennial Review – many of which will need to be completely retried – the Authority would needlessly waste time and resources. More importantly, the confusion certain to result from duplicate proceedings raises serious potential for legal error. The Hearing Officer's attempts to resolve this issue by agreement is laudable and in keeping with the TRA's commitment to civil and cooperative proceedings whenever possible. The Authority, however, need not be held hostage by the parties' inability to "agree" to defer issues. Rather, the TRA can use its authority to reasonably manage its dockets even without an agreement of the parties.

Notably, in this case, the parties have already waived the requirement that the arbitration be completed within the nine-month window under the Act. Consequently, the TRA is under no statutory requirement to hurriedly proceed in the face of the procedural concerns discussed herein. Instead, the TRA would be well within its discretion to recognize the potential for a time-consuming, confusing and disorderly



hearing, and to ward off such a problem by rescheduling the arbitration hearing until such time as either these matters have been addressed in the Triennial Review proceeding or until the parties have had an opportunity to file written supplemental testimony.

**V. RELIEF REQUESTED**

While BellSouth has not had time to determine whether, in fact, each of the issues addressed by the Hearing Officer is necessarily addressed definitively in the Triennial Review Order, it appears that the potential is great for these issues to be addressed through the Triennial Review proceedings. Consequently, BellSouth proposes that the TRA take one of two alternative courses:

1. **Deferral of Issues to the Triennial Review Docket.** The TRA can rule that issues 21, 25, 26, 36, 37, and 57 (each issue identified by the Hearing Officer as potentially effected by the Triennial Review Order) should be deferred from the DeltaCom Arbitration, and heard instead in the Triennial Review proceedings, and the Arbitration could proceed on all other issues. In the interim, without a decision in the arbitration on these issues, the parties would continue to operate under the current evergreen agreement (for those specific issues) until such time as an agreement is reached through negotiation pursuant to the change of law provisions of their contract, or until such time as these issues are addressed in the Triennial Review proceedings. Those issues not impacted by the Triennial Review Order would proceed as scheduled; or

2. **Continuance of the DeltaCom Arbitration Hearing for Approximately 45 Days.** The TRA can continue the DeltaCom Arbitration hearing in its entirety to permit the parties to provide written supplemental testimony explicitly addressing the Triennial Review Order to the extent the parties believe it to be relevant. Such a decision would be consistent with TRA Rule 1220-1-2-.16(5) which provides specifically that parties

have the right to cross-examine witnesses who testify and shall have the right to submit rebuttal testimony subject to the standards of admissibility and such limitations as the Hearing Officer or the Chair, whichever is presiding at the hearing, may reasonably require.

By continuing the hearing to provide for the submission of supplemental testimony and supplemental rebuttal testimony, the TRA will ensure that parties in this arbitration actually do have the right to provide rebuttal testimony. The opportunity to rebut testimony provided with no notice, live on the stand, is not a meaningful rebuttal opportunity. Moreover, as noted above, the nine-month clock for arbitration has already been allowed to run in this matter, and the parties will not be prejudiced by an additional delay in order to ensure the orderly presentation of testimony and the preservation of the opportunity for meaningful rebuttal and cross-examination. BellSouth believes that the filing of testimony could be completed in time to schedule the hearing in October.

## **VI. CONCLUSION**

The release of the Triennial Review Order need not result in the type of unusual and, surely, unwieldy hearing that will result from the Hearing Officer's recommendation.

The TRA's first priority must be to ensure that its process is conducive to a fair and just determination of the issues before it. The course charted by the Hearing Officer simply would not provide the TRA with a reasonable process in which to conduct this arbitration. For all of the reasons articulated above, BellSouth urges the Authority to either defer the issues noted above and consider them in the context of the Triennial Review proceedings or to continue the hearing in its entirety in order to provide parties with the opportunity to present their cases in a reasonable and orderly fashion.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

☐ Hand  
☐ Mail  
☒ Facsimile  
☐ Overnight  
☒ Electronic

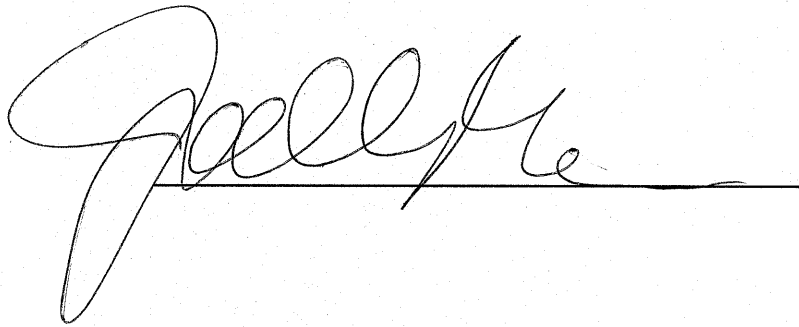
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A handwritten signature in cursive script, appearing to read "J. Adelman", is written over a horizontal line.